

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000550-001 DT

01/20/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

NORMAN BRICE

MARTIN A BIHN

v.

PEORIA CITY PERSONNEL BOARD (001)

JAVIER G RAMOS

DAVID R MERKEL
1333 E RANCH ROAD
TEMPE AZ 85284

MINUTE ENTRY

This Court has jurisdiction of this Special Action proceeding pursuant to the Arizona Constitution, Article VI, Section 18, and Rule 1, Arizona Rules of Procedure for Special Actions. As a preliminary matter, this Court notes that the record is now complete and this court has received and reviewed the final order of the City of Peoria Personnel Board, dated February 12, 2003.

This Court has considered the memoranda submitted by counsel, the record from the City of Peoria Personnel Board, including the order just cited, and the Hearing Officer's recommended decision, dated January 31, 2003. This Court has considered and reviewed its notes from the oral argument in this case and considered the arguments made by counsel. This case has been under advisement since December 1, 2003.

1. Jurisdiction

This Court determines that special action jurisdiction is appropriate in this case and this court will accept jurisdiction, as it is clear from the pleadings and arguments submitted that the Petitioner, Norman Brice, has no other remedy by appeal, or otherwise, from the City of Peoria Personnel Board's Order, dated February 12, 2003. It further appears to this court that the Petition for Special Action raises significant issues of relevance and importance to police agencies and personnel boards throughout the state. This Court, therefore, determines that acceptance of special action jurisdiction is appropriate and necessary in this case, and this Court will accept jurisdiction.

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2. Procedural History and Facts of the Case.

Petitioner, Norman Brice, was a police officer with the Peoria Police Department serving as a SWAT Team Sniper on November 20, 2001. During a hostage incident on that date at 10485 N. 73rd Drive within the City of Peoria, the Petitioner shot and killed 20-year old Julian Navarro. An investigation by the Peoria Police Department and the Maricopa County Attorney's Office ensued. At the conclusion of this investigation, Peoria Police Chief, David Leonardo, determined that Brice violated the Peoria Police Department's "Use of Force Policy". Chief Leonardo demoted Officer Brice to the position of a Police Services Officer¹, and suspended him for 310 duty hours. Officer Brice appealed from the Chief's disciplinary order. The appeal proceeded to the Peoria Personnel Board who assigned former Tempe City attorney, David Merkel, to sit as their hearing officer. Hearing Officer Merkel conducted a six-day evidentiary hearing in December of 2002.

On January 31, 2003, Hearing Officer Merkel issued his decision. The hearing officer approved and incorporated into his findings of fact most of the proposed findings proposed by the City of Peoria. The hearing officer's opinion is seven pages and contains numerous detailed findings of fact and conclusions of law. The hearing officer concluded that the equitable doctrine of estoppel against the government applied in this case and that the City of Peoria Police Department was estopped from the application of its "deadly force policy" by the failure of senior management within the Peoria Police Department to communicate clearly that use of force policy to "line level police officers".²

The critical finding and conclusion of law rendered by the hearing officer was the failure of the Peoria Police Department to inform its police officers of the differences between the Peoria Police Department's "Use of Deadly Force Policy", and the requirements of State law in regard to use of force. The hearing officer concluded:

Officer Norman Brice was and is not some ill-trained or unprofessional police officer. His years in the U.S. Marine Corp. and his specialized training in the appropriate use of all types of weapons, coupled with his extensive training by the Maricopa County Sheriff's Office and Peoria Police Department made him one of the most experienced members of the SAU Team, especially trained to deal with hostage and barricade situations. The hearing officer is not unmindful that Arizona law and Peoria PD's use of force policy can differ and I do not doubt the sincerity of Chief Leonardo's strong conviction that there is such a difference. What is missing is that not one line level officer

¹ Not a sworn police officer position, but a police aide position.

² Hearing officer's findings of fact conclusions of law and recommendation, dated January 31, 2003, conclusions of law, paragraph 5.

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testified that he knew there was such a difference. Police Departments, being paramilitary organizations, obviously need numerous policies and procedures. This is as it should be. It is, however, essential that such policies and procedures be clearly transmitted and explained to line level employees who are in the “front lines”, so to speak. Here, every officer who testified thought that if a police officer complied with the use of force justifications under state law that he/she would automatically comply with the Peoria PD’s Use of Force Policy. This apparent dichotomy (i.e., what senior management thought the policy was vs. what line-level police officers understood the policy to be) then takes us into the realm of the legal doctrine of equitable estoppel against the government.³

The hearing officer also found:

Here the training of Peoria Police Officers by the department regarding the use of force, including deadly force, was to the effect that if the officer complied with the criteria established in Arizona State Law, specifically, A.R.S. 13-410(c)(1), the officer would satisfy the criteria set forth in (City of Peoria) Policy PD Policy for the use of lethal force.

The Peoria PD now contends that Officer Brice’s actions, whether in conformance with State law, violated Police Department Policy. This present position is inconsistent with the information and instructions it had previously given to Officer Brice and other officers through verbal representations and written materials (emphasis added).⁴

The hearing officer then went on to correctly and accurately apply the equitable doctrine of estoppel against a government entity. Unfortunately, the hearing officer’s conclusions regarding equitable estoppel were completely ignored by the City of Peoria Personnel Board. The City of Peoria Personnel Board voted unanimously to reverse the recommendation of the hearing officer and reinstitute the action of Chief Leonardo. The final order of the Personnel Board, dated February 12, 2003, makes absolutely no mention of the equitable doctrine of estoppel as applied to a governmental entity.

³ Id.

⁴ Id., at paragraphs 7 and 8.

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3. The only legal issue is whether the doctrine governmental estoppel applies.

The only legal issue before this court is whether the equitable doctrine of estoppel against a governmental entity applies in this case. Clearly, that doctrine exists in Arizona Law.⁵ The hearing officer properly identified the criteria necessary to apply the doctrine of equitable estoppel against a governmental entity as: (1) That the party to be estopped commits a subsequent inconsistent act; (2) That the party asserting the estoppel actually and reasonably relied on prior representations of the party sought to be estopped; and (3) That there is a showing of subsequent detrimental reliance by the innocent party on the prior representation made by the party to be estopped. Additionally, when the party to be estopped is a governmental agency a fourth showing must be made that recognition and application of the doctrine of estoppel will not unduly interfere with the government's operations.⁶ The hearing officer made all of the appropriate findings based upon the evidence, and also determined that application of the doctrine of estoppel will not unduly interfere with the operation of the Peoria Police Department.

The City of Peoria Personnel Board ignored these findings and legal conclusions concerning the doctrine of equitable estoppel against the City. The Board offered no explanation in rebuttal, or legal explanation as to how the hearing officer might have erred.

As a general principal of law, administrative agencies, as well as trial courts, must give deference to facts determined by administrative law judges and hearing officers. It is clearly an abuse of discretion to ignore findings of fact and determinations found by administrative law judges and hearing officers.⁷ And, certainly, a reviewing court or agency must determine whether an administrative law judge correctly applied the relevant law to the facts found by the administrative law judge.⁸ However, for an administrative agency to ignore findings of fact and application of relevant law by its own hearing officer is an abuse of its discretion.⁹

⁵ See Valencia Energy Co. v. Arizona Department of Revenue, 191 Ariz. 565, 959 P.2d 1156 (1998); La Paz County v. Upton, 195 Ariz. 219, 986 P.2d 252 (App. 1999); Pingitore v. Town of Cave Creek, 194 Ariz. 261, 981 P.2d 129 (App. 1988).

⁶ Findings of Fact and Conclusions of Law and Recommendation, dated January 31, 2003, Conclusions of Law, paragraph 6.

⁷ Scottsdale Healthcare, Inc. v. Arizona Healthcare Cost Containment System Administration, 206 Ariz. 1, 75 P.3d 91 (2003); Nutek Info Systems Incorporated v. Arizona Corporation Commission, 194 Ariz. 104, 977 P.2d 826 (App. 1998).

⁸ Id.

⁹ Significantly, the Peoria City attorney does not seriously argue with the application of the estoppel doctrine to this case. Rather, the City attorney's position has been that this court must affirm and administrative agency where substantial evidence supports its determinations. Substantial evidence does not support the action of the City of Peoria Personnel Board, as that Board ignored the significant legal issue that rendered Chief Leonardo's disciplinary action inappropriate.

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4. Conclusion.

This Court determines that the City of Peoria Personnel Board abused its discretion and acted arbitrarily and capriciously in ignoring specific findings of fact and conclusions of law made by its hearing officer, David Merkel, regarding the application of the equitable doctrine of estoppel against the Peoria Police Department. The Personnel Board ignored the overwhelmingly important, and dispositive facts that the City of Peoria Police Department failed to communicate to its police officers the differences between the City of Peoria Police policies and State law regarding use of deadly force. Application of this doctrine of estoppel bars disciplinary action against the Petitioner, Norman Brice. The City of Peoria Personnel Board erred in rejecting its hearing officer's recommendations.

IT IS THEREFORE ORDERED reversing the order and determinations of the City of Peoria Personnel Board, dated February 12, 2003, in their entirety.

IT IS FURTHER ORDERED directing the City of Peoria Personnel Board to ratify and approve the recommendations contained within its hearing officer's Findings of Fact, Conclusions of Law, and Recommendation, dated January 31, 2003.

IT IS FURTHER ORDERED that the Respondents reverse the disciplinary action against Petitioner Norman Brice, and that he be returned to his former position with no loss of benefits and reimbursement of benefits denied during the interim period of this pending litigation.

IT IS FURTHER ORDERED that counsel for the Petitioner shall prepare and lodge its application for attorneys' fees and costs incurred in this litigation.

IT IS FURTHER ORDERED that counsel for the Respondents may submit a response to said application and affidavit.

IT IS FURTHER ORDERED setting oral argument on the issue of attorneys' fees and costs, as requested by the Petitioner in this case, on **February 23, 2004 at 10:45 a.m.** before Judge Michael D. Jones, **201 W. Jefferson, CCB-4th Floor, Courtroom 401, Phoenix, AZ 85003.**

IT IS FURTHER ORDERED oral argument is limited to five (5) minutes for each side, unless permission to exceed this limit has been granted.

Court Reporter

This division does not have an assigned court reporter. Should you need a court reporter, you must request one in writing to this Division at least five (5) days prior to the scheduled hearing date.

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IT IS FINALLY ORDERED that counsel for the Petitioner shall lodge an order consistent with this minute entry opinion, no later than February 27, 2004.